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No. 85-546

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

UNITED STATES OF AMERICA,

Petitioner,

v.

FLORENCE BLACKETTER MOTTAZ
on behalf of herself and all
others similarly situated,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF KATHERINE NICHOLS, CLOVER POTTER, GLADYS ECOFFEY AND ROSEMOND GOINS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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Dated: February 13, 1986

43 pp

EDITOR'S NOTE

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2. Whether There Is Any Federal Statute Of Limitations Which Bars An Action Under 25 U.S.C. §§ 345-346 To Recover Trust Allotments Illegally Transferred By The Secretary Of The Interior To The United States Forest Service?

INTEREST OF THE AMICI CURIAE

Amici are heirs of allottees seeking to recover possession of allotted trust lands from third parties who acquired possession because of the federal policy of forcing fee patents on Indian allottees prior to the expiration of the trust period in violation of the Burke Act, 34 Stat. 182, 25 U.S.C. § 349. Certain aspects of amici's claims rely on 25 U.S.C. §§ 345-346 and the need to avoid the time bar contained in 28 U.S.C. § 2401(a). Therefore, amici are interested in the outcome of the present case. The Native American Rights Fund, attorney for amici, herein, is a national Indian legal organization with a general interest in these questions.

Both Petitioner and Respondent consent to the filing of this brief.

SUMMARY OF ARGUMENT

The language and underlying policy behind 25 U.S.C. §§ 345-346 indicate that the jurisdictional grant is not limited to actions to compel the issuance of allotments in the first instance. Rather, jurisdiction extends to actions to recover allotments illegally lost. This interpretation is implicitly supported by decisions of this Court. See e.g., McKay v. Kalyton, 204 U.S. 458 (1907) and is directly supported by numerous Courts of Appeals' decisions. See e.g., Gerard v. United States 167 F.2d 951 (9th Cir. 1948); Fontenelle v. Omaha Tribe, 430 F.2d 143 (8th Cir. 1970).

The Quiet Title Act, 28 U.S.C. § 2409a did not repeal 25 U.S.C. §§

345-346 and therefore the statute of limitations contained in 28 U.S.C. § 2409a(f) is inapplicable.

The statute of limitations contained in 28 U.S.C. § 2401(a) is inapplicable to actions to recover allotments under 25 U.S.C. §§ 345-346. Since the land is still held in trust, the statute never starts running. Lewis v. Hawkins, 90 U.S. (23 Wall) 119 (1875). In addition, § 2401(a) came about as a result of the 1948 codification of federal law. It derived from a provision that did not apply to §§ 345-346. There was no congressional intent to extend its applicability in the 1948 codification.

ARGUMENT

I. FEDERAL DISTRICT COURT JURISDICTION UNDER 25 U.S.C. §§ 345-346 INCLUDES OWNERSHIP CLAIMS TO PREEXISTING ALLOTMENTS

25 U.S.C. §§ 345-346 confer jurisdiction on district courts to adjudicate the right of any Indian to an allotment of land, and the statute waives the immunity of the United States to suit. If Mottaz's claims in this case are construed as allotment ownership claims,[1/] this statute confers jurisdiction to decide whether the trust title of the United States

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1/Mottaz's claim was construed by the Court of Appeals to be an ownership claim to allotted land. Amici take no position on the question of how to read her claim. Our brief addresses the issues presented as if the Court decides to treat her claim as one to assert ownership of Indian allotments.

was lawfully removed from her allotments. The government argues the contrary on the theory that the statute applies only to assert rights to new allotments, its so-called "original allotment" theory. Gov. Br., pp. 33-47. If the Court reaches this issue, the government's interpretation should be rejected.

The government's case on this question sounds better than it is because the government's brief gives a distorted history of the statute. The brief quotes from judicial opinions in which the quoted language was dictum without disclosing this, and it fails to acknowledge the weight of contrary precedent. In fact, every reported

judicial holding on point is contrary to the government's position.[2/]

A. The Purpose Of 25 U.S.C. §§ 345-346 Is To Provide Indian Allotment Owners With A Judicial Forum For Ownership Claims Arising During The Trust Period

The central words of the statute that define its scope are "any action, suit, or proceeding in relation to their right thereto" and "any action, suit, or proceeding . . . involving

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2/This is not to say that the Congresses of 1894 and 1901, which gave us the statute, expected it to last until 1986. Their understanding was that allotments would last but 25 years and that both allotments and Indian reservations would then disappear. See, e.g., Solem v. Bartlett, 104 S.Ct. 1161, 1165 (1984) ("Consistent with prevailing wisdom, members of Congress voting on the surplus land acts believed to a man that within a short time--within a generation at most--the . . . reservation system would cease to exist.") But Congress did contemplate that the statute would be available to Indians as long as the trust period continued.

the right . . . to any allotment." These are comprehensive words that take in any claim of right to an allotment, new or preexisting. That the statute's operation ends when the trust period ends may be inferred from the provisions requiring service on the United States as trustee.

This reading is confirmed by judicial opinions written soon after enactment. One of the first courts to construe the statute stated, "under the act of August 15, 1894 (28 Stat. 385), the jurisdiction, in cases coming within the purview of the act, may be exercised while the title remains in the United States" (emphasis added). Sloan v. United States, 95 F. 193, 195 (C.C.D. Neb. 1899) (Shiras, J.), appeal dismissed,

193 U.S. 614 (1904). In McKay v. Kalyton, 204 U.S. 458, 468-69 (1907), this Court elaborated:

> [P]rior to the act of Congress of 1894 controversies necessarily involving a determination of the title and incidentally of the right to the possession of Indian allotments while the same were held in trust by the United States were not primarily cognizable by any court, either state or Federal . . .
>
> "By [the act of 1894] the United States consented to submit its interest in the trust estate and the future control of its conduct concerning the same to the result of the decree of the courts of the United States, a power which such courts could alone exercise by virtue of the consent given by the act . . . . Nothing could more clearly demonstrate, than does this requirement, the conception of Congress that the United States continued as trustee to

> have an active interest in the proper disposition of allotted Indian lands and the necessity of its being made a party to controversies concerning the same. . . "

We have underlined parts of the quoted words to call attention to those most pertinent to this case--words that indicate this Court's view that the scope of the statute is coextensive with the federal trust and includes "future control" of allotted land and its "proper disposition." While the McKay case is not a holding on the issue before this Court, it is this Court's most comprehensive prior description of the statute, and it did involve a controversy over an allotment previously made.3/

3/McKay involved a dispute between allotment heirs, and this

(footnote continued on next page)

We do not suggest that §§ 345-346 extend to any lawsuit with some logical relationship to an allotment. The statute depends on a claim of right to allotted land. On occasion, litigants have attempted to invoke the statute not to test questions of their ownership rights to allotments but to challenge federal Indian policy. The courts have denied jurisdiction over these claims. As this Court said in Arenas v. United States, 322 U.S. 419, 432 (1944), the courts must "separate questions of right from questions of

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3/(continued) particular subject was expressly removed by later legislation. See discussion, infra, at pp. 26-27. But that change does not affect the relevance of the Court's description of the act of 1894.

policy." In the course of carrying out this Court's mandate in that case, the lower federal courts adjudicated many questions of right beyond the original right to an allotment, including disputes between allottees, allocation of appurtenant water rights, and recovery of accumulated rents and profits. The government's original allotment theory was expressly rejected. United States v. Pierce, 235 F.2d 885 (9th Cir. 1956); Segundo v. United States, 123 F. Supp. 554 (S.D. Cal. 1954), appeal dismissed, 221 F.2d 296 (9th Cir. 1955). But the lower courts refused to allow the adjudication of claims beyond questions of allotment ownership rights. E.g., United States v. Preston, 352 F.2d 352 (9th Cir.

1965) (no jurisdiction under 25 U.S.C. §§ 345-346 over action by non-Indian lawyer for Indian allottees seeking to collect legal fees).

B. The Government's Theory Limiting The Statute To Original Allotments Will Not Withstand Analysis

Just what is the government's theory? At first, one would think that the government seeks to limit the statute to suits by Indians against the government to compel the making of an original allotment. But this cannot be correct. The statute's words say that Indians may "prosecute or defend any action, suit, or proceeding in relation to their right" to an allotment (emphasis added). This version of the government's theory is inconsistent with the words "or defend," which contemplate a

contest between Indians to an allotment, previously made.

Moreover, the statute specifies that it covers claims "to an allotment . . . or . . . to have been unlawfully denied or excluded from any allotment." The disjunctive words belie the government's theory. One cannot be "excluded from" an allotment that has not yet been made. If a drafter sought to create a statute to allow only suits to compel the making of new allotments, the statute would stop with the word "denied." This version of the government's theory violates the basic rule of statutory construction that courts ought to give meaning to all words of a statute, to render none redundant.

Also, a reading of the statute limited to compelling the making of original allotments would be contrary to clear precedent in this Court. Most of the early reported decisions involved cases in which an allotment had been made to one Indian, and another Indian sued to claim a better right to that allotment. One of these was Hy-yu-tse-mil-kin v. Smith, 194 U.S. 401 (1904), in which jurisdiction was confirmed at pp. 407-09. In another case, the government argued in favor of this limited reading of the statute and lost. United States v. Fairbanks, 171 F. 337 (8th Cir. 1909), aff'd, 223 U.S. 215 (1912)

Possibly the government has a somewhat different theory in mind. Possibly it would allow lawsuits over

allotments previously granted if the contest challenges the initial granting of the allotment but not if it challenges something that occurred even one day later. If so, this theory tidies up the government's problem with the statutory words "or defend" and "or excluded from." But it depends on an even more strained implication from the statutory words. The government's version now would not be that the statute is limited to test whether an Indian has a right to get an original allotment from the government. Instead, it extends to challenges against an Indian previously allotted filed by another Indian claiming a better title to that existing allotment. But, according to this theory, the basis for the better

title claim must antedate the making of the allotment; if that claim depends on an event occurring one day after the allotment was made to the first allottee, there would be no jurisdiction. Illegal acts by government agents may be sued upon if they occur up to and including the day the allotment is made, but illegal acts after that would be immune from suit.

This reading simply does not accord with a purposeful reading of the statute. As this Court noted in McKay v. Kalyton, supra, a basic purpose of Congress was to involve the United States as trustee in lawsuits respecting allotments "during the period in which the land was to be held in trust." 204 U.S. at 468.

From the point of view of an Indian allottee or would-be allottee, the federal trust poses several problems. The Interior Department retains extensive control over the allotment during the trust. See Felix S. Cohen's Handbook of Federal Indian Law 618-27 (1982 ed.). In some cases, the alleged wrongdoer is a federal agent. In all cases, the United States is fee title holder. The statute's purpose is to provide jurisdiction to overcome these problems. See F. Cohen, Handbook of Federal Indian Law 381 (1941). Congress could have given this jurisdiction to state courts (as in fact it was for some Oklahoma tribes, see 1982 Cohen, supra, at 787-88, but Congress chose federal courts. In any case, the logical

scope of the statute in light of its purpose is the period of federal trust, when the title is in the United States. Cf. United States v. Rickert, 188 U.S. 432 (1903). The statute is part and parcel of the congressional scheme of the General Allotment Act, 25 U.S.C.§§ 331 et seq. to protect and defend the Indians' beneficial ownership of their allotments, a purpose this Court has defended against the actions of the federal government. See Squire v. Capoeman, 351 U.S. 1, 9 (1956). See also United States v. Mitchell (I), 445 U.S. 535 (1980).

The government also relies on the wording in §§ 345-346 that provides that the judgment or decree in any 345-346 case shall be certified to the

Secretary "as if such allotment had been allowed and approved by him." Gov. Br., p. 35. But this language does not supply the limitation to new allotments that the government advocates. Any Indian who has prevailed in court on his or her right to any allotment, whether a new or existing one, needs to have the title recognized by the Secretary because of the management duties and control that the Secretary exercises over allotted land--control that was much greater at the time the statute was enacted--and because legal title to allotted land is in the United States. 25 U.S.C. §§ 345-346 contemplates cases in which the government, though named and served, chooses not to appear. The section specifies that the action may

go forward without the government. On each of these points, see the Court's discussion in McKay v. Kalyton, supra, 204 U.S. at 467-69.

C. The Legislative History Does Not Support The Government's Theory

The government asserts that legislative history supplies its "original allotment" theory with the support that the words do not. Gov. Br., pp. 36-40. A basic problem with the government's readings from legislative history is that the statute plainly includes suits to obtain an original allotment, and when it was first enacted in 1894, many early cases under the statute were likely to be of this sort. Thus, any suggestion from the legislative history that this kind of suit was to

be permitted is correct but proves nothing respecting the issue at bar.

Nothing the government cites, nor any reference known to us, says that only claims to new allotments are allowed and claims to existing allotments are excluded. In each case, the government's argument depends on two steps: construing words such as "claims to allotments" to mean, by implication, only claims to new allotments, then construing the words by negative implication to exclude claims to existing allotments. In context, none of the references can be said with any confidence to mean what the government argues. In each case, the purpose of the language quoted was quite remote from the issue before this Court.

There is no evidence that Congress or particular members intended to describe the scope of the statute.

Much of the legislative history cited is not history of the statute itself but of later special exclusions from it of particular tribes in eastern Oklahoma. In these instances, the focus of Congress was on the reasons for the exclusions, not on the scope of the statute itself.

D. 28 U.S.C. § 1353 Has The Same Scope As 25 U.S.C. §§ 345-346

The allotment jurisdiction statute that appears in the judicial code, 28 U.S.C. § 1353, does not include all of the words discussed above. Standing alone, it might be a more ambiguous statute. (It also omits the express limitation in 25 U.S.C. § 345-346 to Indian plaintiffs only.) But § 1353

did not amend 25 U.S.C. §§ 345-346.[4/] Codifications of this sort are normally construed not to repeal or modify the statutes organized by the codification unless the contrary intent clearly appears. This rule is expressed in the wording of the 1911 judicial code, which created what is now § 1353. Act of March 3, 1911, ch. 231, § 294, 36 Stat. 1087, 1167 ("unless such change of intent shall be clearly manifest.")

Moreover, the general codifications of 1925-1926, 1940, and 1948 each carried forward 25 U.S.C. §§ 345-346 as still in force, and this Court and lower federal courts have continued to treat the earlier law as

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4/The government inferentially suggests the contrary at Gov. Br., p. 38.

remaining in force and to treat its language as controlling. See the cases cited infra under E. and F. A good example is Seifert v. Udall, 280 F. Supp. 443 (D. Mont. 1968), in which a non-Indian plaintiff tried to rely on § 1353, which is not expressly limited to Indian plaintiffs. The court declined jurisdiction based on the express words of 25 U.S.C. §§ 345-346. See also, 1982 Cohen, supra, at 313-14 n.265.

E. Decisions Of This Court Construing 25 U.S.C. §§ 345-346 Do Not Support The Government's Theory

We have already discussed McKay v. Kalyton, supra, which we believe to be this Court's most pertinent examination of the statute. See also Hy-yu-tse-mil-kin v. Smith, supra. The government relies on dicta in other opinions that are more remote from the issue here.

The government's brief relies very heavily on the Court's opinion in First Moon v. White Tail, 270 U.S. 243, 245 (1926), but it never explains the holding in the case. Gov. Br., pp. 39, 40-41. An Indian sought judicial review of an heirship dispute with another Indian over an allotment in the teeth of the express language of 25 U.S.C. § 372, which commits heirship determinations to the exclusive jurisdiction of the Secretary. The Court quite properly upheld the exclusive jurisdiction conferred by the heirship law. The scope of 25 U.S.C. §§ 345-346 was irrelevant to this issue, and the decision is clearly correct on either view of the question now before this Court.

The language quoted by the government was inserted in the course

of rejecting a weak argument of plaintiff's counsel. All parties recognized that prior to the enactment of the heirship statute in 1910, the federal courts had exercised jurisdiction over heirship disputes between Indians claiming allotments. The very purpose of the 1910 act was to take away that jurisdiction and commit it to the Secretary exclusively. The First Moon plaintiff argued that the 1911 judicial code enactment of what is now 28 U.S.C. § 1353 had restored the jurisdiction that the 1910 heirship statute had taken away. Since there is no indication that Congress so intended, and codifications are not to be read to alter the substantive scope of the laws they include, this was clearly a correct decision. See Hallowell v. Commons, 239 U.S. 506 (1916); 1982

Cohen, supra, at 314. But it does not support the government here.

In fact, the pre-1910 practice of adjudicating allotment heirship disputes shows the error of the government's theory. These were a class of allotment cases that did not involve original allotment rights but that were heard by the federal courts pursuant to what is now 25 U.S.C. §§ 345-346 prior to 1910. An example of such jurisdiction in a reported case is Patawa v. United States, 132 F. 893 (C.C.D. Ore. 1904), sustaining jurisdiction over a dispute between an allottee's heir and the allottee's widow claiming a dower right in the allotment.

Moreover, since 1910, at least one federal court has sustained 345-346 jurisdiction to decide a constitutional challenge to an heirship

determination, and this Court affirmed. Simmons v. Eagle Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965), aff'd mem., 384 U.S. 209 (1966). In several other decisions, this Court has cited the statute in circumstances that imply its availability in instances other than suits for original allotments. Minnesota v. United States, 305 U.S. 382, 389 n.5 (1939) (condemnation of allotted land); Heckman v. United States, 224 U.S. 413, 441-42 (1912) (recovery of allotments wrongfully sold at state tax sales.)[5/]

[5/]Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), relied on by the government, (Gov. Br., pp. 35, 41), is not to the contrary. The Court there held that the land in question was not allotted land and thus not within the scope of 25 U.S.C. §§ 345-346. See 1982 Cohen, supra, at 314.

F. Lower Federal Court Decisions On Point All Reject The Government's Theory

In numerous decisions, the Courts of Appeals for the Eighth, Ninth, and Tenth Circuits have sustained jurisdiction over actions by Indians to protect or defend the ownership rights in trust allotments other than actions to obtain a new allotment. E.g., Christensen v. United States, 755 F.2d 705 (9th Cir. 1985) cert. pet. pending, No. 85-372; Begay v. Albers, 721 F.2d 1274 (10th Cir. 1983); Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (8th Cir. 1970); United States v. Pierce, supra; Gerard v. United States, 167 F.2d 951 (9th Cir. 1948).

The government's brief acknowledges these decisions in a footnote but then attempts to impugn

them by asserting that two of the circuits followed the government's theory. Gov. Br., pp. 42-43 n.22. This contention is not correct. These courts had earlier rejected jurisdiction over claims that were not claims of right to Indian allotments. Some were attacks on federal Indian policy, others were actions for money damages. See Vincenti v. United States, 470 F.2d 845 (10th Cir. 1972), cert. dismissed, 414 U.S. 1057; Harkins v. United States, 375 F.2d 239 (10th Cir. 1967); United States v. Preston, supra; United States v. Eastman, 118 F.2d 421 (9th Cir. 1941). All were properly dismissed. See 1982 Cohen, supra, at 314 n.269. There is mention of the government's theory in the opinions, but only as

dictum.[6/] When these courts were confronted with the issue of §§ 345-346 jurisdiction in cases that did involve allotment ownership rights, each of them sustained jurisdiction.

One of the lower court cases is worthy of note because it shows the distinction between the cases that the government wins and those that it loses. In Scholder v. United States,

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6/How these dicta came about can be readily surmised. In each case, the government made, inter alia, the same argument it has made to this Court on this point. In each case, the court concluded that the case did not lie within 345-346 because no claim of right to an allotment was alleged. Busy courts then uncritically accepted all the arguments of the winning side, including the new-allotment-only theory. But in other cases when the issue was squarely presented, each court took a more careful look and disagreed with the government.

428 F.2d 1123 (9th Cir.), cert. denied, 400 U.S. 942 (1970), Indian plaintiffs challenged the Secretary of the Interior's practice of spending Indian irrigation appropriations to benefit non-Indian landowners and the Secretary's imposition of liens on Indian allotments. The court denied §§ 345-346 jurisdiction over the former part of the case because it did not involve any issue of ownership rights in allotments. But the court sustained §§ 345-345 jurisdiction over the lien issue because that did involve ownership rights. The government's new-allotment-only theory was expressly rejected. Id. at 1125-27, 1129.

The government also claims the Seventh Circuit as its champion,

relying on Coleman v. United States Bureau of Indian Affairs, 715 F.2d 1156 (7th Cir. 1983). Gov. Br., p. 42 n.22. Again, the claim is incorrect. In Coleman, descendants of Creek Indians sued the government for money damages for breach of trust in the disposition of land of the Creek Nation. The suit was brought in Illinois, though the land was in Oklahoma. The court first noted that the plaintiffs did not claim ownership rights in allotted land. "What appellants seek is money damages for alleged breach of trust in the management of surplus, unallotted lands." Id. at 1162 (emphasis added). The court then speculated about a possible allotment claim that appellants might have brought. Even this hypothetical claim was rejected,

not on the government's theory, but because 345-346 do not apply to the Creek Tribe. Id. at 1162-64. This decision does not support the government here.

II. THE QUIET TITLE ACT, 28 U.S.C. § 2409a DID NOT REPEAL 25 U.S.C. §§ 345-346

A. Repeals By Implication Are Not Favored

The United States claims that the Quiet Title Act, 28 U.S.C. § 2409a (QTA) governs claims to ownership of an allotment in the possession of the United States action and that the twelve year statute of limitations contained in that Act therefore applies. 28 U.S.C. § 2409a(f). This amounts to an argument that the QTA repeals 25 U.S.C. §§ 345-346.

The QTA and 25 U.S.C. §§ 345-346 deal with different matters. The QTA was concerned that the general population of the United States be provided with an opportunity to sue the United States to resolve disputes to land in which the United States claimed an interest. 25 U.S.C. §§ 345-346 preceded the QTA by more than 75 years and was passed to provide protection to Indian allottees with whom the United States has an ongoing trust relationship. There is no indication that in passing the QTA, Congress meant to deprive allottees of preexisting remedies. "The intention to repeal must be clear and manifest." Morton v. Mancari, 417 U.S. 535, 551 (1974).

The principle against repeals by implication is more forceful where it is urged that a specific provision has been repealed by a later general provision. Busic v. United States, 446 U.S. 398 (1980); United States v. United Continental Tuna Corp., 425 U.S. 164 (1976). The QTA and §§ 345-346 are easily capable of coexistence; therefore the QTA did not repeal them.

B. Congress Specifically Excepted Indian Trust Land From The QTA

The QTA waives the sovereign immunity of the United States from suit in actions "to adjudicate a disputed title to real property in which the United States claims an interest . . . ." 28 U.S.C. § 2409a(a). However, the waiver is specifically limited: "This section

does not apply to trust or restricted Indian lands . . . ." Id.[7] When Congress specifically conditions a waiver of sovereign immunity, the condition should be honored. Block v. North Dakota 461 U.S. 273, 287 (1983). Giving the exception for Indian trust lands its natural meaning here would serve to "[p]reserve the commitments the United States has made to the Indian people," (an identified motive of Congress in passing 28 U.S.C. § 2409a). Block v. North Dakota, supra, 461 U.S. at 283; Gov. Br., p. 24. If Congress did not want to submit Indian lands to potential loss in suits by other parties, there

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[7]In Grosz v. Andrus, 556 F.2d 972 (9th Cir. 1972) relied upon by the government, the court declined to rule on whether 28 U.S.C. § 2409a applied to a dispute over a right of way over trust land. 556 F.2d at 974.

is no reason to assume it would have intended the anomalous result of having possession of land lost to the trustee.[8]

III. 28 U.S.C. § 2401(a) DOES NOT BAR ACTIONS FOR RECOVERY OF ALLOTMENTS UNDER 25 U.S.C. §§ 345-346

A. So Long As The United States Holds The Land In Trust, 28 U.S.C. § 2401(a) Does Not Bar An Action Under 25 U.S.C. §§ 345-346 To Recover An Allotment

Both the United States and amicus curiae, American Land Title Association, take issue with the Court of Appeals' holding that ". . . if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee

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[8]28 U.S.C. § 2409a(f) would not itself effectuate a change in title even if it applied. Block v. North Dakota, 461 U.S. 273, 291-92 (1983).

simply retains title all along." Mottaz v. United States, 753 F.2d 71, 74 (8th Cir. 1985).[9] That holding is in line with prevailing authority that statutes of limitations do not run against the beneficiary, where there is a continuing trust. Lewis v. Hawkins, 90 U.S. (23 Wall) 119 (1875); Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238 (N.D. Cal, 1973) (citing cases), Scott on Trusts, 3d ed. § 219.1, p. 1758 and f.n. 1. See also Daney v. United States, 247 F. Supp. 533 (D. Kan. 1965), aff'd, 370 F.2d 791 (10th Cir. 1966); Nash v. Wiseman, 227 F. Supp.

9/In other words, the United States continues to hold the land under the express trust of the General Allotment Act, 25 U.S.C. §§ 331 et seq., and its extensions. See United States v. Mitchell (I), 445 U.S. 535 (1980).

552 (W.D. Okla. 1963); Dodge v. United States, 362 F.2d 810 (Ct.Cl. 1966), involving the inapplicability of federal tax statutes of limitation to income derived from trust property.

For present purposes, it is assumed that the Secretary acted beyond his authority in "selling" the land to the Forest Service.[10] The United States still holds the land in trust for the allottees' heirs. The statute of limitations does not run while the trust continues. Lewis v. Hawkins, supra. The present action

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10/The district court had dismissed on statute of limitations grounds. The Court of Appeals reversed and remanded for consideration of whether the transfer was void. Only if it was void would the bar of 28 U.S.C. § 2401(a) be avoided. Mottaz v. United States, 753 F.2d 71, 75 (8th Cir. 1985).

seeks to compel the United States to acknowledge its trust and is an action incidental to the trust.[11/] Such an incidental action is not subject to the statute of limitations while the trust continues. Manufacturers Trust Co. v. Kelly, 125 F.2d 650, 654 (2d Cir.), cert. denied, 316 U.S. 697 (1942) (action to compel restoration of trust res is part of the res itself and its assertion is merely an incident of the beneficiary's right to compel an accounting; therefore the statute of limitations does not run so

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11/Admittedly, Mottaz's theory of the case is not this clear, but this is the view most consistent with the theory of a void transfer.

long as the trust continues); Scott on Trusts, 3d ed., Vol III § 219.1, p. 1758. ("A beneficiary does not lose his interest in the trust property merely because of a lapse of time, however great . . . ." Id.) As stated previously, in the present posture of this case, it is assumed the trust continues. This situation must be contrasted with those where title to land protected by an express trust is not involved. See e.g., Capoeman v. United States, 440 F.2d 1002, 1007-1008 (Ct.Cl. 1971). Menominee Tribe of Indians v. United States, 726 F.2d 718, 722 (Fed. Cir. 1984), cert. denied, 105 S.Ct. 106 (1985).

In Ewert v. Bluejacket, 259 U.S. 129, 138 (1922) this Court refused to let laches or state statutes of limitation give validity to a void

deed so as to bar the rights of Indian wards in lands subject to statutory restrictions. The federal policy of protecting Indian lands also led this Court to refuse to borrow a state statute of limitations to defeat a claim to title in County of Oneida v. Oneida Indian Nation, 105 S.Ct. 1245 (1985). Federal policy militates against construing § 2401(a) to bar an action to recover an allotment where, as will be shown, there is no evidence Congress intended it to apply to actions under §§ 345-346.[12]

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[12]Also, the United States did not notify Mottaz of the possible existence of a claim until November 1981 (Gov. Br., p. 3) and her suit was filed the following month. It is highly unlikely that Congress, in ensuring that Indians would have one final chance to bring claims under 28 U.S.C. § 2415 (see County of Oneida v. Oneida Indian Nation, 105 S.Ct. 1245 (1985)) meant for such claims against the United States to be barred.

B. The Legislative History Of 28 U.S.C. § 2401(a) Establishes That It Does Not Apply To Actions Concerning Indian Trust Allotments [13]

28 U.S.C. § 2401(a) states:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person

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[13]The argument to be made here has been rejected in certain circumstances as shown by the collection of lower court cases in the Gov. Br., p. 48. The question is one of first impression for this Court, however, and the clarity of the history will indicate the correctness of amici's view. Also, the Ninth Circuit Court of Appeals, while applying § 2401(a) to bar an action under §§ 345-346, specifically noted that the case before it did not involve a question of void title as does this case. Big Spring v. United States Bureau of Indian Affairs, 767 F.2d 614, 616-617 and n.1 (9th Cir. 1985).

> under legal disability or beyond the seas at the time the claims accrues may be commenced within three years after the disability ceases.

The statute which became § 2401(a) of the 1948 codification was part of § 41(20) of Title 28 in the 1940 Code, which in turn, can be traced to the 1911 codification. 36 Stat 1087 et seq. The 1911 provision (amended at 42 Stat. 311 (1921) to include provisions relating to recovery of taxes) provided that the district court would have original jurisdiction as follows:

> (20) Suits against United States.
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any

> regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, . . . and of all setoffs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court;
>
> . . .
>
> . . . No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. (Emphasis supplied).

36 Stat. 1093.

The statute of limitations was thus restricted to the causes of

action enumerated in the paragraph. The government's argument depends on the notion that the 1948 recodification of Title 28 intended to apply to actions for trust allotments, a limitation which had not previously applied.

The 1948 Revision of the Judicial Code separated the jurisdictional provision in paragraph 20 of 28 U.S.C. § 40, supra from the limitation period contained in the same paragraph. The jurisdictional provision became 28 U.S.C. § 1346(a) and the limitation period was moved to 28 U.S.C. § 2401(a). The Revisers' notes establish conclusively that there was no intention to make § 2401(a) applicable to actions to which it had not been previously applicable. The

Revisers' notes point out that § 2401 "[c]onsolidates the provision in section 41(20) of Title 28 U.S.C., 1940 ed., as to time limitation for bringing contract actions against the United States with section 942 [torts time limitation] of said Title 28." H. Rep. No. 308, 80th Cong. 1st Sess. p. A185 (1947); note also published at 28 U.S.C.A. § 2401. Thus, all that was being done was to combine the time limits for contracts and torts into one provision. There was no intent to apply a statute of limitations where it had not applied before.

Under the applicable rules of statutory construction, unless an intent to make changes is clearly expressed, no changes of law or policy

can be presumed from statutory revision. United States v. Ryder, 110 U.S. 729 (1884); McDonald v. Hovey, 110 U.S. 619 (1884). As the Court stated in Anderson v. Pacific Coast S.S. Co., 225 U.S. 187, 199 (1912):

> For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed. (Citations omitted).

In McDonald v. Hovey, this Court ruled on an issue very similar to the present case, namely whether a revised statute concerning limitations on actions was intended as an expansion of its previous meaning and construction. The Court held that a revision of a statute cannot enlarge or change its meaning unless Congress clearly indicates its intention to do so:

> So upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology--some change other than what may have been necessary to abbreviate the form of the law. Sedg. State. Const., 365. As said by the New York Court for the Correction of Errors, in Taylor v. Delancy, 2 Cai. Cas., 150: "Where the law antecedently to the revision was settled, either by clear expressions in the statute, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the Legislature to work a change." (Citations omitted.)

110 U.S. at 629.

These rules of construction are particularly applicable to the 1948 revision of the United States Code

which was an especially monumental undertaking. Application of those rules of construction was confirmed by the Chief Reviser of the Judicial Code, Title 28, in an article written shortly after the revision. Barron, The Judicial Code, 8 F.R.D. 439, 445-46 (1949):

> Because of the necessity of consolidating, simplifying and clarifying numerous component statutory enactments no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed.
>
> Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.
>
> Congress recognized this rule by including in its reports the complete Reviser's Notes to each Section in which are noted all instances where change is intended and the reasons therefor. (Emphasis supplied).

As pointed out previously, former § 41(20) related only to civil actions against the United States enumerated therein. Actions under §§ 345-346 were not among those enumerated. There was no intent in the 1948 codification to effect a change in the law as to the statute of limitations; therefore, 28 U.S.C. § 2401(a) was not made applicable to actions to recover allotments under 25 U.S.C. §§ 345-345.

C. An Intent To Diminish Special Indian Rights Must Be Clearly Expressed

Prior to 1948, Congress plainly had not placed any limitations on

actions brought pursuant to 25 U.S.C. §§ 345-346. 28 U.S.C. § 2401(a), as part of the 1948 Code Revision, is a later general statute of limitations which has no effect on the special statute authorizing actions for allotments or other Indian land, 25 U.S.C. §§ 345-346. In order to change or modify §§ 345-346, there must be some clear expression on the part of Congress to do so.

> Privileges granted to a certain class by special act are not affected by inconsistent general legislation, unless a contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom. But the special act and the general law stand together, the one as the law of the particular class and the other as the general rule. (Citations omitted).

Hemmer v. United States, 204 F. 898, 906 (8th Cir. 1912), aff'd, 241 U.S. 379 (1916).

Where special Indian rights are involved, this rule of construction is particularly applicable. Squire v. Capoeman, 351 U.S. 1 (1956); Morton v. Mancari, 417 U.S. 535 (1974). In Squire, the Supreme Court refused to hold that the special protection afforded Indian allotments found in the patents, was affected by the broad language of the Internal Revenue Act so as to make income derived from the restricted land taxable. And in Mancari, the Court held that the general Equal Employment Opportunity Act of 1972 did not repeal Indian preference found in other acts of Congress.

Under the same rules of construction as applied in Mancari, Squire and Hemmer, the general statute of limitations for civil actions

against the United States cannot be interpreted to apply to the special Indian statute, 25 U.S.C. §§ 345-346 authorizing actions against the United States involving the right to an allotment or other parcel of land, in the absence of a clear expression of intent by Congress. Ordinary rules of statutory construction fully support this result; special rules applicable to construction of Indian statutes compel the result:

> . . . we must be guided by that "eminently sound and vital canon," Northern Cheyenne v. Hollowbreast, 425 U.S. 649, 655 n 7, 48 L.E. 2d 274, 96 S.Ct. 1793 (1976), that "statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians. Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89, 63 L.Ed. 138, 39

> S.Ct. 40 (1918). See Choate v. Trapp, 224 U.S. 665, 675, 56 L.Ed. 941, 32 S.Ct. 565 (1912); Antoine v. Washington, 420 U.S. 194, 199-200, 43 L.Ed. 2d 129, 95 S.Ct. 944 (1975).

Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

Finally, the great attention given to making 28 U.S.C. § 2415 applicable to causes of actions by Indians against third parties demonstrates the unlikelihood that 28 U.S.C. § 2401(a) would have been made applicable to claims under 25 U.S.C. §§ 345-346 with not a word to that effect in the legislative history.

D. The Consistent Administrative Interpretation of 28 U.S.C. § 2401(a) Has Been That The Statute Is Not Applicable To Actions Brought Pursuant To 25 U.S.C. §§ 345-346

Until relatively recently, the United States had not interpreted any

statute of limitations as applicable to actions under 25 U.S.C. §§ 345-346. See Loring v. United States, 610 F.2d 649 (9th Cir. 1979) (first Court of Appeals decision of which we are aware). Previously, actions had often been brought without regard to the statute. See Sampson v. United States, 533 F.2d 499 (9th Cir. 1976); Fontenelle v. Omaha Tribe of Indians, 298 F. Supp. 855 (D. Neb. 1969), aff'd, 430 F.2d 143 (8th Cir. 1970). Even after Loring cases have been brought without regard to any statute of limitations. Antoine v. United States, 637 F.2d 1177 (8th Cir. 1981).

Moreover, we know of no cases in which the former statute, 28 U.S.C. § 41(20), was invoked as a defense by the United States in actions filed

prior to 1948. See e.g., Gerard v. United States, 167 F.2d 951 (9th Cir. 1948); Arenas v. United States, 322 U.S. 419 (1944).[14/]

CONCLUSION

This Court should affirm the decision of the Eighth Circuit Court of Appeals. In the alternative, if the Court should rule that one of the defenses raised by the United States is applicable, it should limit its opinion to the specific situation

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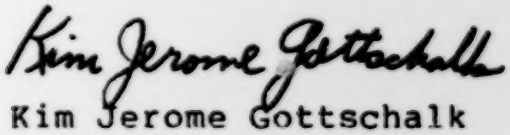
14/The policy of the federal government both before and after 1948 has consistently reflected an intent to protect Indian lands by bringing suit on behalf of the individual Indian in cases such as this despite the number of years between the initial wrong and the filing of the suit. See, e.g., United States v. Hemmer, 241 U.S. 379 (1916); United States v. Joyce, 240 F. 610 (8th Cir. 1917); United States v. State of Washington, 233 F.2d 811 (9th Cir. 1956); United States v. Krause, 92 F. Supp. 756 (D.La. 1950).

where the United States possesses the land and should leave open their question of the applicability of any defense where the United States is joined under 25 U.S.C. §§ 345-346 because of its complicity. See Covelo Indian Community v. Watt 551 F. Supp. 366, 382 (D.D.C. 1982).

Respectfully submitted,



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